

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JUNE 18, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0117-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM J. WOCELKA,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

CANE, P.J. William Wocelka appeals a conviction for operating a motor vehicle while intoxicated, third offense. He contends that under the penalty scheme of § 346.65(2), STATS., before the trial court may impose the increased penalty for three convictions within a ten-year period under § 346.65(2)(c), STATS., the defendant must have been first penalized for a second conviction within the five-year period under § 346.65(2)(b), STATS. This court rejects his argument and affirms the conviction.

The facts are undisputed. On February 13, 1995, Wocelka was arrested for OWI, his third offense. His blood alcohol concentration was .215. Wocelka had two prior convictions for OWI: a conviction on May 2, 1988,

resulting from a violation on February 7, 1988, and another conviction on July 10, 1989, resulting from a violation on March 12, 1989. Because this was Wocelka's third conviction for OWI within a ten-year period, the trial court imposed the criminal penalty required under § 346.65(2)(c), STATS.

Wocelka reasons that because the number of convictions in the five years prior to this most recent conviction is zero, and because the legislative scheme is to punish repeat OWI offenders with increasingly harsher penalties, the statutory scheme under § 346.65(2), STATS., is ambiguous. Therefore, he concludes that he should be sentenced only as a first offender, a civil offense. This court disagrees.

The penalty scheme for OWI violations is provided in § 346.65(2), STATS., which states in relevant part:

- (2) Any person violating s. 346.63(1):
 - (a) Shall forfeit not less than \$150 nor more than \$300, except as provided in pars. (b) to (e).
 - (b) Shall be fined not less than \$300 nor more than \$1,000 and imprisoned for not less than 5 days nor more than 6 months if the total number of suspensions, revocations and convictions counted under s. 343.307(1) equals 2 in a 5-year period, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.
 - (c) Shall be fined not less than \$600 nor more than \$2,000 and imprisoned for not less than 30 days nor more than one year in the county jail if the total number of suspensions, revocations and convictions counted under s. 343.307(1) equals 3 in a 10-year period, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.
 - (d) Shall be fined not less than \$600 nor more than \$2,000 and imprisoned for not less than 60 days nor more than one year in the county jail if the total number of suspensions, revocations and convictions counted

under s. 343.307(1) equals 4 in a 10-year period, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

- (e) Shall be fined not less than \$600 nor more than \$2,000 and imprisoned for not less than 6 months nor more than one year in the county jail if the total number of suspensions, revocations and convictions counted under s. 343.307(1) equals 5 or more in a 10-year period, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

Questions of statutory interpretation are reviewed de novo. *State v. Jones*, 192 Wis.2d 78, 84, 532 N.W.2d 79, 93 (1995). When interpreting a statute, this court must start with the language of the statute. *State v. Dawson*, 195 Wis.2d 161, 167, 536 N.W.2d 119, 121 (Ct. App. 1995). Here, § 346.65(2)(c), STATS., stands by itself without reference to any other portion of the statute. It is true that the legislative penalty scheme is to treat repeat OWI offenders with harsher penalties. However, there is no language or suggestion that the legislature created a condition precedent to sentencing a person under (2)(c) by requiring that the person must also meet the criteria for sentencing under (2)(b). The statute is clear and unambiguous. A penalty is prescribed for each set of conditions and is independent of the other subsections.

The State argues correctly that once the facts of a case merit the imposition of a sentence under one of the penalty enhancing paragraphs, the trial court no longer has any options. Each paragraph begins with the word "shall," thereby making it mandatory for the trial court to assess the prescribed criminal penalty once the required criteria is established. Here, it is undisputed that Wocelka's most recent OWI conviction is his third OWI conviction within a ten-year period. Thus, he clearly falls within the prescribed penalty under § 346.65(2)(c), STATS., a criminal penalty.

This court therefore rejects Wocelka's argument and affirms the judgment convicting him of OWI with the imposed penalty under § 346.65 (2)(c), STATS.

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.